

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JOHN BOWYER,	)	
	)	
Petitioner,	)	3:04-CV-0654-LRH-RAM
	)	
vs.	)	ORDER
	)	
CRAIG FARWELL, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	

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Respondents have filed a motion to dismiss the petition for writ of habeas corpus filed by John Bowyer. Docket #15. As the basis for their motion, respondents contend that Bowyer has failed to exhaust his state court remedies for three of his four federal habeas claims. Bowyer has not opposed the motion.

A. The Exhaustion Requirement.

A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982); 28 U.S.C. § 2254(b). A federal court cannot hear a "mixed petition," - that is, a petition that contains both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-

1 22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). Thus, if  
2 a single one of the claims in the petition is unexhausted, the court  
3 is obliged to dismiss the petition for lack of exhaustion.

4 State remedies have not been exhausted unless the claim has been  
5 "fairly presented" to the state courts and the highest state court has  
6 had an opportunity to dispose of the claim on the merits. *Duncan v.*  
7 *Henry*, 513 U.S. 364, 365-66 (1995); *O'Sullivan v. Boerckel*, 526 U.S.  
8 838, 845 (1999). Furthermore, a petitioner has not exhausted his  
9 state court remedies unless he "characterized the claims he raised in  
10 the state proceedings *specifically* as federal claims." *Lyons v.*  
11 *Crawford*, 232 F.3d 666, 670 (9<sup>th</sup> Cir. 2000). To meet the *Lyons*  
12 requirement that a claim be identified as grounded in federal law, the  
13 petitioner must have supported the claim in state court proceedings  
14 with either a reference to specific provisions of the federal  
15 constitution or statutes or a cite to federal case law. 232 F.3d at  
16 670. The Ninth Circuit Court of Appeals has held that citation to  
17 a state case is sufficient to present a federal claim if the state  
18 case "analyz[es] a federal constitutional issue". See *Peterson v.*  
19 *Lampert*, 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (en banc). However, mere  
20 similarity between state and federal claims is not sufficient for  
21 exhaustion purposes. *Duncan*, 513 U.S. at 366.

22 B. Bowyer's Claims.

23 Respondents contend that Bowyer has failed to exhaust his state  
24 court remedies for Grounds One, Two, and Four of his current federal  
25 petition. With respect to Grounds One and Two, Bowyer indicates in  
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1 his petition (docket #10) that he exhausted his state court remedies  
2 in the direct appeal of his conviction. While he did raise a claim  
3 similar to Ground One in his opening brief to the Nevada Supreme  
4 Court, his argument in support of that claim was grounded in state,  
5 not federal law. Exhibit 10.<sup>1</sup> Thus, Ground One is unexhausted.

6 Ground Two, on the other hand, was fairly presented as a federal  
7 law claim to the Nevada Supreme Court. In Ground Two, Bowyer claims  
8 that his federal right to due process was violated because the state  
9 did not present sufficient evidence to support a finding that the  
10 sexual conduct for which he was convicted occurred without the  
11 victim's consent. In his opening brief on direct appeal, Bowyer cited  
12 to *McNair v. State*, 108 Nev. 53, 825 P.2d 571 (1992) (Exhibit 10, p.  
13 19), which applied the federal law standard outlined in *Jackson v.*  
14 *Virginia*, 443 U.S. 307, 319, (1979). *McNair*, 108 Nev. at 56.  
15 Moreover, Bowyer cited to the Due Process Clause of the United States  
16 Constitution in arguing the issue in his reply brief. Exhibit 12, p.  
17 4. Thus, Ground Two is exhausted.

18 In Ground Four, Bowyer claims that he was deprived of effective  
19 assistance of counsel, as guaranteed by the Sixth and Fourteenth  
20 Amendments, because his state trial counsel failed to file a motion  
21 for a mental evaluation of the victim. Respondents argue that Ground  
22 Four is unexhausted because, to the extent that the claim may have

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23 <sup>1</sup> Because Bowyer has not opposed the respondents' motion to  
24 dismiss, the court is left to assume that respondents have provided  
25 an accurate record of the pertinent state court proceedings. That  
26 record and the exhibits referred to herein are located at docket  
#16/17.

1 been raised in Bowyer's state post-conviction proceedings, it was  
2 insufficiently plead. While respondents have been unable to produce  
3 a copy of Bowyer's post-conviction petition, they point to the Nevada  
4 Supreme Court's conclusion on appeal that twenty of Bowyer's  
5 ineffective assistance of counsel claims "were completely devoid of  
6 specific factual support." Exhibit 15, p. 6.

7 Without a copy of Bowyer's petition, this court is unable to  
8 determine whether Ground Four was among the claims presented to the  
9 state court. It is Bowyer's burden, however, to prove that he has  
10 exhausted his state court remedies for each of the claims in his  
11 federal petition. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3<sup>rd</sup> Cir.  
12 1997); *Matthews v. Evatt*, 105 F.3d 907, 911 (4<sup>th</sup> Cir. 1997). Because  
13 Bowyer has not come forward with evidence to the contrary, Ground Four  
14 is unexhausted.

15 C. Conclusion.

16 The court finds that Bowyer has not exhausted his state court  
17 remedies for Grounds One and Four. Consequently, the court finds  
18 Bowyer's First Amended Petition to be a "mixed" petition - one  
19 containing both claims exhausted in state court and claims not  
20 exhausted in state court. As such, the entire petition is subject to  
21 dismissal, unless Bowyer elects to abandon the unexhausted claims.

22 As an alternative, the court may, under some circumstances, stay  
23 habeas proceedings and hold the petition in abeyance while the  
24 petitioner returns to state court to exhaust remedies. In *Rhines v.*  
25 *Weber*, 544 U.S. 269, 125 S.Ct. 1528 (2005), the Supreme Court recently  
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1 placed some limitations upon the discretion of this court to  
2 facilitate a habeas petitioner's return to state court to exhaust  
3 claims. The *Rhines* Court stated:

4 [S]tay and abeyance should be available only in  
5 limited circumstances. Because granting a stay  
6 effectively excuses a petitioner's failure to present his  
7 claims first to the state courts, stay and abeyance is  
8 only appropriate when the district court determines there  
9 was good cause for the petitioner's failure to exhaust  
10 his claims first in state court. Moreover, even if a  
11 petitioner had good cause for that failure, the district  
12 court would abuse its discretion if it were to grant him  
13 a stay when his unexhausted claims are plainly meritless.  
14 Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ  
15 of habeas corpus may be denied on the merits,  
16 notwithstanding the failure of the applicant to exhaust  
17 the remedies available in the courts of the State").

18 125 S.Ct. at 1535.

19 In view of *Rhines*, if Bowyer wishes to return to state court to  
20 exhaust his unexhausted claims, he must make a showing of good cause  
21 for his failure to exhaust his unexhausted claims, and he must show  
22 that his unexhausted claims are not plainly meritless. The court will  
23 grant petitioner an opportunity to make that showing. Alternatively,  
24 if Bowyer wishes, he may file a declaration stating that he wishes to  
25 abandon his unexhausted claims (Grounds One and Four) and proceed in  
26 this action with his remaining exhausted claims.

21 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss  
22 (docket #15) is **GRANTED**. The court finds Grounds One and Four to be  
23 unexhausted in state court.

24 **IT IS FURTHER ORDERED** that, if petitioner wishes to return to  
25 state court to exhaust his unexhausted claims, petitioner shall have  
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1 **thirty (30) days** from the date of entry of this Order to show good  
2 cause for his failure to exhaust his unexhausted claims, and to  
3 present argument regarding the question whether or not his unexhausted  
4 claims are plainly meritless. Respondents shall thereafter have  
5 **twenty (20) days** to respond. Petitioner shall thereafter have **fifteen**  
6 **(15) days** to reply.

7 **IT IS FURTHER ORDERED** that, in the alternative, if petitioner  
8 wishes to abandon his unexhausted claims (Grounds One and Four) and  
9 proceed in this action with his remaining exhausted claims, petitioner  
10 may, within **thirty (30) days** from the entry of this order, file and  
11 serve a declaration to that effect. If petitioner abandons his  
12 unexhausted claims, respondents shall answer or otherwise respond to  
13 the remaining claims in the habeas petition within **thirty (30) days**  
14 of the service of petitioner's declaration to that effect.

15 DATED: January 24, 2006.

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19 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE